REDHA RESOURCES SDN BHD v. MAJLIS AGAMA ISLAM SELANGOR & ORS

COURT OF APPEAL, PUTRAJAYA
AHMADI ASNAWI JCA
AB KARIM AB JALIL JCA
LEE SWEE SENG JCA
[CIVIL APPEAL NO: B-01(NCVC)(W)-51-01-2018]
22 APRIL 2020

CONTRACT: *Agreement – Concession agreement – Breach – Allegation of – Concessionaire's failure to obtain certificate of completion and compliance – Whether concessionaire committed fundamental breaches – Whether respondents entitled to terminate agreements – Whether respondents estopped from doing so by their own conduct – Whether termination of agreement lawful – Claim for damages – Assessment of*

The appellant was the main contractor and concessionaire for a build, operate and transfer project ('project') in a public sector and private sector partnership with respect to the development of student hostels and a student centre for Kolej Universiti Islam Antarabangsa Selangor Sdn Bhd ('KUIS'), the second respondent. The project was on a piece of land owned by the first respondent. Under the concession agreement ('CA') between the respondents and the appellant, the period of concession was for 33 years from the date of the CA. A supplementary agreement was signed between the parties where the respondents' guarantee of the full rental based on 100% occupancy of students under the CA would also be extended to the inter-semester periods. For the purpose of financing the project, the appellant took a syndicated loan from Bank Muamalat Malaysia, the third respondent and two other banks. The appellant and the banks executed various Islamic financing facility agreements to secure the financing and repayment of financing by the appellant to the banks ('facility agreements'). Additionally, to guarantee the repayment of the financing facility by the appellant to the banks, the respondents executed a payment guarantee agreement with the third respondent. Subsequently, the respondents said that the appellant failed to obtain the approval of the building plans prior to commencement of construction of the hostel blocks and failed to obtain the certificate of completion and compliance ('CCC') upon handing over of the buildings to the second respondent and that the appellant had misrepresented and led the respondents to believe that all the requirements for the procurement or issuance of the CCC had been complied with before the delivery of the vacant possession of the said project to the second respondent. The respondents alleged that the appellant had committed fundamental breaches of the CA and

filed this suit. The respondents prayed for an order that the CA and all the supplementary agreements be terminated and following thereto, for the appellant to be liable for all the penalties and costs incurred by the respondents for rectifying and making good the omissions and neglects of the appellant. The appellant denied that it had misrepresented to and misled the respondents as alleged since the second respondent, being the supervising officer of the project, had all the specific knowledge on what transpired on the issues alleged. The appellant stressed that the respondents, despite knowing that the CCC had not been obtained upon the completion of the buildings and the issuance of the certificate of practical completion ('CPC'), insisted that the buildings be occupied then. The relief sought by the respondents against the third respondent was to terminate the payment guarantee agreement in the event the CA was terminated. The appellant, in turn, counterclaimed against the respondents for the recovery of the arrears of rental and other attendant and appropriate compensations since after it had run the concession for a couple of years, the respondents notified the appellant that the second respondent was in financial difficulties and wished to run the concession itself to ease its financial burdens. The respondents persuaded the appellant to hand over the operation of the concession to the second respondent and the appellant, in good faith, obliged. The respondents then took over the operation of the concession through the second respondent from 1 December 2012. The appellant said that within six months thereafter, the second respondent was to acquire fresh financing from the third respondent and to execute and complete the taking/buying over of the concession. However, the second respondent did not pay the contracted rental to the appellant as well as servicing the loan taken by the appellant from the third respondent, causing the third respondent to terminate the facility and suing the appellant for the recovery of the loan plus financial charges. In the High Court, the Judicial Commissioner ('JC') made the following orders (i) that the appellant had breached the CA; (ii) that the CA and supplementary agreement be terminated; (iii) that the value of the building be assessed at the current market value and the respondents to pay the amount so valued to the third respondent; and (iv) the amount of current market value to be set-off against monies paid by the respondents under the CA prior to its termination. The appellant, aggrieved by the decision of the JC, appealed against the decision in the judgment of the High Court, except for the order in (ii) and (iii). The respondents cross-appealed against the decision of the High Court with respect to orders (iii) and (iv). The issues that arose were, *inter alia*, (i) whether the appellant had committed fundamental breaches of the CA such that the respondents were entitled to terminate the CA; (ii) whether the termination of the CA by the respondents was lawful

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in the circumstances of the case; and (iii) whether the counterclaims of the appellant should be allowed and what was the basis for assessment of damages.

Held (ordering accordingly)
Per Lee Swee Seng JCA delivering the judgment of the court:

(1) The appellant was to comply with all the requirements of the law with respect to the construction of the hostels. The formal approval of the building plans by the local authority had not been obtained before the commencement and completion of the construction. However, any reasonable person involved in a building project such as this project would have raised the issue of when submission for approval was made and when a reply would be forthcoming. This was a case where the respondents, in all probabilities, would have asked about the status of the approval of building plans and would have given its nod by the respondents to go ahead as there were steep deadlines to meet. It is a common thing for a developer or contractor to commence works while waiting for approval of the building plans though it is illegal to do so. (paras 33, 44, 48 & 53)

(2) The appellant's confidence to proceed was perhaps boosted by the fact that this was a construction for a university college owned by Majlis Agama Islam Selangor ('MAIS') and the local authority would appreciate the need for the urgency of the project to be completed as soon as possible to cater for the ever increasing number of students and undergraduates. If the appellant had waited for the building plans to be approved, the delay would have been lengthy and the ultimate losers would have been the respondents. This was not to condone statutory non-compliance but the reality of the matter here was that the appellant, as the developer and contractor, had to take calculated risks. Whatever it was, the respondents did not raise this breach timeously and acted decisively to stop the work until the building plans had been approved. By the time it was raised, the project had been completed. Nothing came in the way of the parties proceeding with the performance of the CA and with the students occupying the hostels and rental being collected and paid to the appellant under the CA. There was no loss that the respondents could show that they had suffered and they were not issued any summons by the local authority for allowing the project to commence and proceed to completion without the building plans duly approved. To now use it as a ground for terminating the CA would be most unfair to the appellant and indeed the respondents would be estopped from doing so by their conduct. (paras 51 & 54-59)

(3) The respondents clearly could live with the fact of the breach if there was one. It was really a *fait accompli* and a convenient excuse to terminate the CA as it was they themselves who now, because of cash flow problems, deem it more beneficial to terminate the CA and take over the management of the hostels. The fact remained that the respondents had allowed the students to continue to occupy the hostels even assuming that they were not aware of the infraction before. There was no evidence that they themselves sought to disassociate from this untimely discovery by notifying the students that the building had been built illegally and that students should not be occupying it or that if they should choose to occupy it then their rental would be reduced for it was an illegal building with the possibility of unsafe structures for its building plans had not been approved. The respondents could not blow hot and cold. This was in any event not a fundamental breach that would justify termination and repudiation of the CA. It was an afterthought and an excuse to exit from the CA on terms most favourable to them. (paras 61, 68, 70 & 71)

(4) It was difficult to believe that the respondents could have escaped something so basic as a CCC when the hostels were completed with CPC issued. Either the respondents were sleeping or could not care less or more likely they were aware of it but that the exigencies of the situation were that the students needed to be accommodated and housed in a hostel in campus. The respondents were happily collecting the rentals from the students. The respondents themselves had condoned the non-compliance or the breach where the performance of the CA was concerned in that, they did not stop the students from occupying the hostels on ground that it was illegal to occupy them. The respondents was thus estopped from relying on a lack of a CCC to terminate the CA for there was nothing stopping the CA from running its course. The very timing in the raising of the issue of the CCC only in 2013 after the respondents had failed to fully take over the concession supported the appellant's contention that it was an afterthought. It was an opportunity for the respondents to capitalise on and to exploit it to the fullest in finding a way to buffer their loss in having to terminate the CA. (paras 74, 83, 85, 87 & 92)

(5) Fortuitously for the appellant, the CCC was obtained on the last day of the trial and hence this matter was no longer a live issue before the court. The appellant had taken all necessary steps to comply with the directives and efforts had been made to secure the issuance of the CCC and that in turn meant that it was an ongoing process and therefore would

eventually be issued when all the requirements of all the regulatory bodies would have been complied with. Thus, the issue of CCC not being pleaded by the appellant raised by the respondents was totally misplaced and misconceived. Surely in such a case, as and when the CCC was issued, the appellant must be given the opportunity to lead evidence on it as not doing so would be to allow evidence to remain of that which was no longer true. It would be misleading the court if such a piece of vital evidence was not allowed to be admitted to correct what would then be an incorrect position. The evidence of the CCC having been issued did not go beyond the pleading of the appellant but rather was an extension of it. The respondents had no basis to object to the evidence of the CCC being adduced as that was after all the whole ultimate basis of their suit. There was in any event no damage or loss suffered by the respondents. Thus, the above breaches were not fundamental breaches that would entitle the respondents to terminate the CA. (paras 93, 100, 101, 102, 103, 112, 113 & 115)

(6) It is not every breach that would entitle the non-defaulting party to terminate the contract and more so when the non-defaulting party had acquiesced in the breach and reaped a benefit as a result of its own participation in the breach. The core of the CA consisted of the 'build-operate-transfer' concept of the project. The project had been built and the appellant had started to operate it until it was persuaded to hand back to the respondents on terms which the parties could not agree. The second respondent was paying the rental to the appellant until the negotiations to take over the operations of the hostels and when the terms for the takeover could not be agreed, the respondents had then decided to capitalise on the so-called breaches to terminate the CA. The breaches were not of the type that would justify a termination and repudiation of the CA that had been substantially completed and performed with no hiccups by the appellant. Furthermore, the act of negotiation to take back the operations of the hostels from the appellant was a clear indication that the parties had continued with the CA and not a case where the respondents had elected to terminate the CA on account of failure to obtain the CCC. The respondents were, in all probabilities, part and parcel of the same purposeful and practical approach to accommodate the students and it was too late in the day to now raise illegality. Thus, the plaintiffs were not entitled to terminate the CA and their termination of the CA was unlawful in the circumstances. (paras 116, 119, 129, 130, 144, 146 & 148)

(7) A fair basis of assessment would be to assess the properties at market value and to allow the deduction from the market value assessed the payments that the respondents had made and would be making to the appellant arising from the arrears of rental not paid. It was staying as close as possible to the formula that the parties had provided for in the event of a breach by the concessionaire appellant. The appellant was also entitled to the rentals that they were unlawfully deprived of from the second semester session 2012/2013 to the second semester session 2014/2015. What the appellant further suffered as a result of the unlawful termination by the respondents was that it was being unlawfully deprived of the profits that it could have made if the concession were to run its full course. As for the assessment of damages for the remaining unexpired period of the concession from 2016 to 2039, that shall be the third respondent's loss of profits compared to a case where the CA was allowed to run its course. The overall assessment of damages shall take into consideration all relevant and necessary costs that naturally arose in the building and operation of the project including the initial costs of constructing the building and furnishing it, the costs of maintaining the hostel and the financing costs. (paras 157-160)

Case(s) referred to:

Amalgamated Investment & Property Co Ltd (in liquidation) v. Texas Commercial International Bank Ltd [1981] 3 All ER 577 ***(refd)***

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***

Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd [1997] 1 CLJ 287 CA ***(refd)***

Damansara Realty Bhd v. Bungsar Hill Holdings Bhd & Anor [2011] 9 CLJ 257 FC ***(refd)***

Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***

Ho Min Choo & Anor v. Jutamo Sdn Bhd [2017] 4 CLJ 651 HC ***(refd)***

Patel v. Mirza [2017] 1 All ER 191 ***(refd)***

Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(dist)***

Sim Chio Huat v. Wong Ted Fui [1983] 1 CLJ 178; [1983] CLJ (Rep) 363 FC ***(refd)***

The Co-operative Central Bank Ltd (In Receivership) v. Feyen Development Sdn Bhd [1995] 4 CLJ 300 FC ***(refd)***

Legislation referred to:

Contracts Act 1950, ss. 40, 56(1), (2), 74
Evidence Act 1950, s. 114(g)
Rules of Court 2012, O. 18 r. 9

For the appellant - Nanthini Nair Ramakrishnan; M/s Idris & Partners

For the 1st & 2nd respondents - Muhammad Fairuz Ahmad Yusof, Dir Kheizwan Kamaruddin, Nurul Muhaniza Hanafi & Sharifah Kalsom Syed Sidki; M/s Abu Zahar Syed Mohd Fuad & Partners

For the 3rd respondent - Muhammad Adam Abdullah & Alina Atikah Zainal Abidin; M/s Adam Abdullah & Mani

[Editor's note: Appeal from High Court, Kuala Lumpur; Civil Suit No: 22NCvC-205-04-2015 (overruled in part).]

Reported by Suhainah Wahiduddin

JUDGMENT

Lee Swee Seng JCA:

[1] This appeal raised the important question as to whether a party may terminate a contract on ground that the alleged defaulting party had failed to comply with some provisions in the contract that resulted in an illegal act being committed when the party seeking to terminate had participated in the illegality as this court shall find.

[2] The illegality in question is that whilst no certificate of completion and compliance ("CCC") had been obtained yet, and this the plaintiffs said was not told to them, the first defendant ("D1") had allowed students of the second plaintiff ("P2") to occupy the hostels and student centre built by it and collected rental from P2 as a concessionaire under a concession agreement ("CA") between the plaintiffs and D1.

[3] However, the undisputed fact is that, assuming the plaintiffs were unaware of the lack of a CCC when the hostels were completed, the plaintiffs continued to allow students of P2 to occupy the hostels even after being informed by the local authority that the CCC had not been obtained for the hostels.

[4] The plaintiffs sought to terminate the CA on the ground of the failure of D1 to obtain the CCC and also on the ground of having commenced construction of the hostel without the relevant building and development plans being approved by the authorities. Once the CA is terminated, the concession period of 33 years would have been terminated as well.

[5] During the concession period, D1 had been allowed to collect the rentals and at the end of the concession period, to hand over possession of the hostels to the plaintiffs, subject to the terms and conditions of the CA.

[6] D1 said the termination of the CA is an excuse to end the concession and to deprive D1 of recouping their investments in the hostels and to the profits it was entitled had the CA being allowed to run its full course. D1's stand is that with the CCC finally being obtained before the trial was concluded, the ground for termination was no longer a live issue and that the termination was unlawful to begin with.

[7] D1 was not seeking specific performance of the CA but rather damages for unlawful termination by the plaintiffs who had also failed in paying rental to D1 and after taking over possession of the hostel, to pay the rentals to the second defendant ("D2"), from whom D1 had taken financing for the hostels.

Project And Parties

[8] The appellant who was D1 in the High Court below, is the main contractor and concessionaire for a build, operate and transfer project ("the project") in a public sector and private sector partnership with respect to the development of student hostels and a student centre for Kolej Universiti Islam Antarabangsa Selangor Sdn Bhd ("KUIS") which is P2. KUIS is registered under the Private Higher Educational Institutions Act 1996 and it offers Islamic higher education programmes to its students.

[9] The project is on a piece of land in Kajang owned by the first plaintiff ("P1") which owns wholly P2. P1 is a statutory body established under the Administration of the Religion of Islam (State of Selangor) Enactment 2003 ("Enactment").

[10] Under the CA dated 7 March 2006 between the plaintiffs and D1, the period of the concession was for 33 years from the date of the CA. A supplementary agreement was signed between the parties dated 25 July 2007 whereby the plaintiffs' guarantee of the full rental based on 100% occupancy of 6,504 students under the CA would also be extended to the inter-semester periods.

[11] For the purpose of financing the project, D1 took a syndicated loan of RM125,800,000 from Bank Muamalat Malaysia Bhd ("D2") and two other banks ("the banks"); with D2 being the facility agent of the syndicated loan. D1 and the banks executed various Islamic financing facility agreements to secure the financing and repayment of financing by D1 to the banks ("facility agreements") dated 3 August 2007.

[12] D1 as security for the financing provided by the banks, had executed an assignment of concession agreement dated 3 August 2007 ("assignment of the CA") with the D2. The effect of the assignment of the CA is that the proceeds obtained by D1 from P2, being rental or accommodation charges under the CA, will be paid to D2. D2 will then distribute the proceeds among the banks in proportion to the financing extended to D1. Notice of the assignment of concession agreement was given to P2 which acknowledged receipt of it.

[13] Additionally, to guarantee the repayment of the financing facility by the appellant to the banks, the plaintiffs executed a payment guarantee agreement dated 3 August 2007 with D2.

A **Proceedings At The High Court**

[14] Plaintiffs said D1 failed to obtain the approval of the building plan prior to commencement of construction of the hostel blocks and failed to obtain the CCC upon handing over of the buildings to P2 and that the D1 had misrepresented and led plaintiffs to believe that all the requirements for
B the procurement or issuance of the CCC had been complied with before the delivery of the vacant possession of the said project to D2.

[15] Based on the above allegations, the plaintiffs alleged that D1 had committed fundamental breaches of the CA dated 7 March 2006. They filed this suit and prayed for an order that the CA and all the supplementary
C agreements dated 25 July 2007 to be terminated and following thereto, for the D1 to be liable for all the penalties and costs incurred by plaintiffs for rectifying and making good the omissions and neglects of D1.

[16] Under the CA, D1 is entitled to full rentals collected from the
D students and from the rentals thus collected, it would bear and pay the maintenance costs of the hostels, besides servicing the syndicated loan granted to it by D2 and its two co-lenders.

[17] In fact, under the CA, P2 had guaranteed that there will be 100% occupancy of the hostels built and under cl. 4.6 further agreed to pay
E accommodation charges to D1 on the basis of not less than 6,504 students.

[18] D1 denied that it had misrepresented to and misled the plaintiffs as alleged since P2, being the supervising officer for the project, had all the specific knowledge on what transpired on the issues alleged. D1 stressed that it is an incontrovertible fact that the plaintiffs, especially P2, despite knowing
F that the CCC had not been obtained upon the completion of the buildings and the issuance of the certificate of practical completion ("CPC") insisted that the buildings be occupied then.

[19] The relief sought by the plaintiffs against D2 was to terminate the
G payment guarantee agreement in the event the concession agreement is terminated.

[20] D1, in turn, counterclaimed against the plaintiffs for the recovery of the arrears of rental and other attendant and appropriate compensations since after it had run the concession for a couple of years, the plaintiffs notified
H D1 that P2 was in financial difficulties and wished to run the concession itself to ease its financial burdens. There were negotiations with respect to P2 buying over the concession including exploring the possibility of the plaintiffs taking over the liabilities of D1 to D2, apart from paying the D1 the arrears of rental, loss of future income and other ancillary reliefs.

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[21] Towards that end, the plaintiffs persuaded D1 to hand over the operation of the concession to P2 and D1 said that, in good faith, it obliged the plaintiffs' request.

[22] At any rate, it is not disputed that the plaintiffs had taken over the operation of the concession through P2 starting from 1 December 2012. D1 said that the target date was that within six months thereafter P2 was to acquire fresh financing from D2 and to execute and complete the taking/buying over of the concession.

[23] D1 further narrated that the said financing was duly offered by D2 and its two co-financiers to P2 but for reasons best known to it, allowed the period of validity of the loan to lapse.

[24] Like the proverbial saying, it doesn't rain but it pours, P2 did not pay the contracted rental to D1 as well as servicing the loan taken by D1 from D2, causing D2 to terminate the facility and suing D1, DW1 and two other directors of D1 for the recovery of the loan plus financial charges. Apart from D2's legal actions, D1 also became indebted to its main contractor, Bina Puri Holdings Bhd ("Bina Puri"), causing DW1 to face a near bankruptcy situation as a guarantor to D1's liability to Bina Puri.

Decision Of The High Court

[25] After hearing the witnesses the learned Judicial Commissioner ("JC") made the followings declarations/orders:

(i) that D1 had breached the CA;

(ii) that CA dated 7 March 2006 & supplementary agreement dated 25 July 2007 be terminated;

(iii) that the value of the building to be assessed at the current market value and the plaintiffs to pay the amount so valued to D2; and

(iv) the amount of current market value to be set-off against monies paid by the plaintiffs under the CA prior to its termination.

[26] D1, being aggrieved by the decision of the learned JC, appealed against the decision in the judgment of the High Court dated 21 December 2017 except for the order in (ii) and (iii) above.

[27] The plaintiffs cross-appeal against the decision of the High Court with respect to (iii) and (iv) above.

[28] The High Court also dismissed the plaintiffs' prayer for the payment guarantee agreement between them and D2 to be terminated. There was no appeal filed by the plaintiffs against this decision of the High Court.

A **Issues Before The Court Of Appeal**

[29] Before us, D1 is the appellant and P1 and P2 are the first respondent and second respondent respectively. D2 is the third respondent. The parties shall be referred to as they were in the High Court. The issues before us as argued by the parties on appeal are as follows:

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(i) whether D1 as the appellant had committed fundamental breaches of the CA such that the plaintiffs as the first and second respondents were entitled to terminate the CA;

(ii) whether in assessing damages payable by the plaintiffs to D1 there shall C be a set-off of the amount paid by the plaintiffs so far from the market value of the property assessed;

(iii) whether the assessment of damages based on the market value of the property should instead be based on the construction costs of the property;

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(iv) whether D2 is entitled to the profits for the unexpired period of the concession taking into consideration its maintenance, financing costs and all related costs; and

(v) whether D1 is entitled to the other reliefs sought on the counterclaim.

E **Principles**

[30] It is not all breaches of a contract that would entitle the innocent party to terminate the contract and more so when that party had affirmed the contract with no appreciable loss suffered. The CA must be construed as a whole in line with the intentions of the parties in choosing the build, operate F and transfer concept of financing of a project and the transfer of the completed buildings back to the grantor after the concession period is over.

[31] The plaintiffs said that the fundamental breaches consisted of commencing work without approval of the relevant plans by the local G authorities and the failure to obtain a CCC even after formal notices to rectify breaches were issued on 5 March 2013 and 19 August 2013. This shall now be examined.

Whether D1 As The Appellant Had Committed A Fundamental Breach Of The CA In Commencing And Completing Construction Of The Project Before The Approval H *Of The Building Plans*

[32] The plaintiffs alleged that D1 had commenced construction of the hostels and completed them without waiting for the approval of the building plans by the authority.

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[33] It is not disputed that D1 is to comply with all the requirements of the law with respect to the construction of the hostels. It is also not disputed that the formal approval of the building plans by the local authority had not been obtained before the commencement and completion of the construction.

[34] However, the plaintiffs and especially P2 who had its representatives in the steering committee would have known about this. It cannot be that something as basic as the approval of building plans had not been discussed during the fortnightly meetings between the plaintiffs and D1.

[35] It must be borne in mind that under the CA, the Rector of R2 is both the Project Director and a member of the Steering Committee and that the site meetings could not be convened if a representative from the plaintiffs is not present. The other representatives in the Steering Committee that met fortnightly consisted of people from the Economic Planning Unit, the Majlis Perbandaran Kajang (MPKj) and the Public Works Department.

[36] D1's evidence through Ar Shaari bin Jamaluddin ('DW3'), was that from his records the building plans for the said project had already been approved by the local council in its meeting of 12 May 2008 and that the relevant endorsement was issued on 21 October 2013 (exh. D48). DW3 testified that the development order was given on 25 June 2007 and he agreed that D1 had commenced works before the development order was obtained.

[37] If at all there was a delay it was administrative delay on the part of MPKj in making the relevant endorsement on the building plans. Therefore, we agree with D1 that the allegation by the plaintiffs that the buildings were illegally erected is misplaced and has no basis.

[38] It is at most an issue of statutory non-compliance between D1 and MPKj and D1 would be subject to fine imposed.

[39] D1 acknowledged that it was fined by MPKj and it duly paid the fine. The important thing is that the building plans were finally approved as originally submitted.

[40] We see this more as a calculated risk that D1 was prepared to take with the knowledge of the plaintiffs for otherwise the plaintiffs would have stopped D1 from commencing works.

[41] It is often a matter of the degree of comfort level between the owner and the developer on the one hand and between the developer and the local authority with respect to whether to commence construction upon submission of the building plans for to wait for formal approval which might take a while in spite of all those clients' charters that would promise approval within a short period of one month or so from submission.

A **[42]** It is often something not minuted as which owner would want to have it openly recorded as being a party agreeing to have a building constructed on its land without the approval of the building plans.

[43] The reality of waiting for the building plans must have weighed on the parties. It is either the developer takes the risk of being fined for proceeding
B without formal approval and even suffer a demolishing order from the local authority or that both the plaintiffs and D1 should wait and not commence construction until a formal approval is obtained.

[44] We are prepared to accept that here is a case where the plaintiffs in all probabilities would have asked about the status of the approval of building
C plans and would have given its nod by the plaintiffs to go ahead as there are steep deadlines to meet for phase one and phase two of the project.

[45] The plaintiffs said they were unaware of that the building plans had not been approved when the construction commenced and even after
D completion the building plans had not been approved yet.

[46] The plaintiffs further submitted that D1 could easily have produced the minutes at trial and since it could not, an adverse inference under s. 114(g) of the Evidence Act 1950 should be drawn against it.

E **[47]** If it is the minutes of the various fortnight meetings then there are no good reason for the plaintiffs especially P2 not to have a copy of it. It is more a case where one could not find any record of the non-approval of the building plans mentioned as no one would want to have any trace of agreeing to proceed without the local authority's approval either under the Town and Country Planning Act 1976 or the Street, Drainage and Building Act 1974.

F **[48]** Any reasonable person involved in a building project such as this project would have raised the issue of when submission for approval was made and when a reply would be forthcoming. If the plaintiffs did not ask than it can only mean that their representatives were sleeping during the
G meetings or that they were not bothered by it.

[49] At any rate, by the time the plaintiffs wanted to terminate based on the ground of non-approval of the building plans, the building and with that the project had been completed with the CPC being issued and what was left was the application and obtaining of the CCC.

H **[50]** This is not a case where an order to vacate the building or to demolish it had been issued by MPKj. The project had been practically completed and P2 had admitted its students to occupy the hostels.

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[51] There is no loss that the plaintiffs could show that they had suffered and they were not issued any summons by the local authority for allowing the project to commence and proceed to completion without the building plans duly approved.

[52] I can accept that D1 based on its experience in the construction market and its liaising informally with the planning and approving department of the local authority must have gathered the gumption to proceed, conscious that this is an area honoured more by its breach than compliance and that one must be prepared to pay the necessary fines if the local authority should issue a summons and a stop work order.

[53] Indeed, the evidence of En Ahmad bin Sairi ('DW4') who was the Director of Building Department of MPKj at p. 757, vol. 2C, record of appeal said in his examination-in-chief that it is a common thing for a developer or contractor to commence works while waiting for approval of the building plans though it is illegal to do so.

[54] Perhaps too D1's confidence to proceed was boosted by the fact that this was a construction for a university college owned by Majlis Agama Islam Selangor ('MAIS') and the local authority would appreciate the need for the urgency of the project to be completed as soon as possible to cater for the ever increasing number of students and undergraduates.

[55] If D1 had waited for the building plans to be approved, the delay would have been lengthy and the ultimate losers would have been the plaintiffs. This is not to condone statutory non-compliance but the reality of the matter here was that D1 as the developer and contractor had to take calculated risks. The fine imposed was part of the costs D1 was prepared to bear in taking up the project and delivering within time.

[56] Whatever it was, the plaintiffs did not raise this breach timeously and acted decisively to stop the work until the building plans had been approved. By the time it was raised, assuming for a moment that they were unaware of it before, the project had been completed.

[57] Nothing came in the way of the parties proceeding with the performance of the CA and with the students occupying the hostels and rental being collected and paid to D1 under the CA.

[58] Nothing too had been shown as to the loss that the plaintiffs had suffered in D1 obtaining the approval of the building plans much later in 2013.

[59] To now use it as a ground for terminating the CA would be most unfair to D1 and indeed the plaintiffs would be estopped from doing so by their conduct.

[60] Even assuming for a moment that the plaintiffs were clueless that the building plans had not been approved, their conduct after having knowledge of this was still to allow their students to occupy the hostels. It was not a case of halting the students from occupying the hostels and having to rent alternative premises for them to be housed in.

[61] The plaintiffs clearly could live with the fact of the breach if there was one. It was really a *fait accompli* and a convenient excuse to terminate the CA as it was they themselves who now, because of cash flow problem, deem it more beneficial to terminate the CA and take over the management of the hostels.

[62] As early as 8 April 2010, P2 had written to D1 to express its interest in taking over the concession. By its further letter dated 12 March 2012, P2 said that the CA had been entered into *aide-memoire* without appreciating the full implication of the concession. It transpired that, as stated in the said letter, P2 was confronted with a deficit of RM18.3m for 2012 and that the payment to D1 for the rental alone constituted 74% of this deficit. See p. 1300 of encl. 10 in the record of appeal ("RA"). P2 openly acknowledged that it could not pay the rental for semester one and two of session 2012/2013 of RM13.6m and could only pay about RM200,000.

[63] P2 was conscious of the fact that it could be sued for default in the rental payment and it duly proposed that any dispute be referred to the Dispute Resolution Committee under cl. 24.1 of the CA and that the dispute be resolved in accordance to the principle of *ukhuwwah Islamiyyah* and consistent with the spirit of the CA.

[64] There were many rounds of negotiation from 2012 to 2014 and D2 had even offered financing to P2 to be guaranteed by P1 to facilitate the plaintiffs taking over the concession. However, the plaintiffs allowed the period of offer of the facility to lapse with no action on their part.

[65] With no payments of rental income, D1 was having difficulty servicing the syndicated loan, not to mention to maintain the hostels and the student centre and to do all that the Fire and Rescue Department required to be done for the issuance of the CCC.

[66] Very importantly, the calculation of damages would be drastically different in a case where the plaintiffs lawfully terminate the CA for breach by D1 for then it would be based on paying D1 the construction costs of the project. A respectable reason had to be found and here there was an opening

and opportunity in the fact that D1 could not show that it had obtained approval of the building plans before it commenced and completed construction of the hostels. Another reason that the plaintiffs relied on was the delay in obtaining the CCC.

[67] One would have thought that an entity such as MAIS, being a government agency, would not have countenanced an illegal structure built on its land and what more a university college that would be inculcating all the noble values of compliance with the law as good citizens.

[68] However, the fact remains that the plaintiffs allowed the students to continue to occupy the hostels even assuming that they were not aware of the infraction before. There was no evidence that they themselves sought to dissociate from this untimely discovery by notifying the students that the building had been built illegally and that students should not be occupying it or that if they should choose to occupy it then their rental would be reduced for it is an illegal building with the possibility of unsafe structures for its building plans had not been approved!

[69] The plaintiffs may then seek to recover their loss from D1 on ground of either the students paid less than the agreed rental or that they refused to stay in the illegal building and so P2 had to incur additional expenses in housing them elsewhere.

[70] What is plain is that the plaintiffs cannot blow hot and cold. If seriously the stand of the plaintiffs is that the building is illegal with all its attendant consequences, then they should not occupy it at all and sue for damages arising from their termination of the CA based on that ground.

[71] This is in any event not a fundamental breach that would justify termination and repudiation of the CA. It was an afterthought and an excuse to exit from the CA on terms most favourable to them.

Whether D1 As The Appellant Had Committed A Fundamental Breach Of The CA In Failing To Obtain The CCC For The Project Even Though The CPC Had Been Obtained

[72] The breach complained of by the plaintiffs is also that the hostels do not have a CCC and so D1 could not have collected rental from P2 as the operational concession period under the CA could not have begun. The plaintiffs said they were unaware of it until they wrote to the local authority Majlis Perbandaran Kajang ("MPKj") and MPKj confirmed their worst fears on 9 January 2014.

[73] However the record shows that even earlier on 5 March 2013 and 21 June 2013, P2 had written to D1 on the things that D1 said it was doing to expedite the issuance of the CCC.

[74] To begin with it is difficult to believe that the plaintiffs could have escaped something so basic as a CCC when the hostels were completed with CPC issued. Surely a natural question to ask would be when CCC would be issued. Again either the plaintiffs were sleeping or couldn't care less or more likely they were aware of it but that the exigencies of the situation were that the students needed to be accommodated and housed in a hostel in the campus.

[75] The plaintiffs are telling the court that one day they suspected something might be amiss and so they wrote to MPKj to confirm this. It is difficult to believe as upon completion of the hostels surely some responsible persons from the plaintiffs would have asked, now that CPC had been obtained, when would CCC be obtained so that the students can come in to occupy the completed hostels.

[76] It cannot be that this never crossed the mind of the plaintiffs until they were not happy with paying D1 the rental because of their own plans in the light of a cash flow problem to now want to take over the concession. It sounds very much like and is more probable that it is an afterthought; seeking for a more respected reason for terminating the CA and what can be more justified then a building without a CCC.

[77] Perhaps the plaintiffs had forgotten that they had made specific provision in the CA under cl. 2.4 for "early commencement of operation" should the exigencies of the circumstances require them to do so. In unabashed candidness and in plain language, cl. 2.4 reads:

> In the event KUIS and/or MAIS requires the Concessionaire to commence the Operational Concession Period **prior to the issuance of the relevant Certificate of Fitness** and the Concessionaire agrees to such request, KUIS shall indemnify and keep indemnified at all times the Concessionaire for any loss or damage it may suffer as a result of such early commencement. (emphasis added)

[78] The "operational concession period" is defined in cl. 1.1 as the period commencing from the date of operation and ending on the last date of the concession period. Clause 1.1 further defines "date of operation" as follows:

> means the date on which the Concessionaire makes available to KUIS the Accommodation and Student Centre for operation which shall be the date on which Certificate of Fitness is obtained or **on 1st September 2007 whichever is later for Phase 1**, and the date on which Certificate of Fitness is obtained or on **1st September 2008 whichever is later for Phase 2.** (emphasis added)

[79] There is of course nothing wrong in thinking aloud and writing down one's thoughts but it does disclose the mindset of the plaintiffs. They were not operating from the high moral platform of complying with the law that there shall be no occupation without the CCC being issued but rather from the practical realities of the intake and influx of students who would look to the plaintiffs to make available student accommodation to them at a reasonable rate.

[80] There was after all a high-powered steering committee empanelled under the CA for the purpose of overseeing and ensuring the smooth running of the construction and development of the accommodation and student centre during the construction period consisting of not just the Rector of KUIS who shall at all times be the Project Director but also a representative each from the National Economic Planning Unit, the Public Works Department, Department of Fire and Rescue, Department of Safety and Health, Kajang Municipal Council (MPKj) and also the Project Architect and Project Manager.

[81] To engender transparency and accountability in the spirit of mutual cooperation towards achieving the successful completion and implementation of the project, there was also included up to three representatives of the financier(s)/investors of the concessionaire (D1).

[82] It would require more than just the plaintiffs to be asleep at the meetings held for the plaintiffs to now persuade the court that they were clueless about the CCC not having being issued when they allowed their students to occupy the hostels or that D1 had misrepresented this to them.

[83] However, what is more astounding is that, assuming for a moment the plaintiffs did not know of this all along, they were continuing as if nothing had happened and the students were occupying the hostels and even more of them now, according to D1. P2 was happily collecting the rentals from the students as provided for under cl. 4.7.1 though after a while beginning 2012 it was no longer paid over to D1 when the plaintiffs had plans of taking over the concession.

[84] The plaintiffs said they gave notice to D1 to rectify the breach and since D1 failed to, they were more than justified to terminate the CA.

[85] This is a case where the plaintiffs themselves had condoned the non-compliance or the breach where the performance of the CA is concerned in that, they did not stop the students from occupying the hostels on ground that it was illegal to occupy them. Either they made a business decision to so allow their students to occupy the hostels without a CCC or that they concealed this information from their students or that they did both.

[86] Both are more than probable when the plaintiffs had contemplated this in cl. 2.4 set out above.

[87] Either way, the plaintiffs are estopped from relying on a lack of a CCC to terminate the CA for there was nothing stopping the CA from running its course. Any fines imposed by the local authority would have to be paid by D1 and D1 said it managed to get a huge haircut on the fines which it paid because of the extenuating circumstances of this case.

[88] The Federal Court in *Boustead Trading (1985) Sdn Bhd v. Arab-Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331 explained the evolution and the various circumstances in which the doctrine of estoppel may be applied as follows at pp. 294 to 295 (CLJ); pp. 344 to 345 (MLJ):

> The time has come for this court to recognize that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless.
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> Edgar Joseph Jr J (as he then was) in an illuminating judgment in *Alfred Templeton & Ors v. Low Yat Holdings Sdn Bhd & Anor* [1989] 2 MLJ 202 at p. 244 applied the doctrine in a broad and liberal fashion to prevent a defendant from relying upon the provisions of the Limitation Act 1952.
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> The doctrine may be applied to enlarge or to reduce the rights or obligations of a party under a contract: *Sarat Chunder Dey v. Gopal Chunder Laha* LR 19 IA 203; *Amalgamated Investment and Property Co Ltd (In liquidation) v. Texas Commerce International Bank Ltd* [1982] 1 QB 84; [1981] 3 All ER 577; [1981] 3 WLR 565. It has operated to prevent a litigant from denying the validity of an otherwise invalid trust (see, *Commissioner for Religious Affairs, Trengganu & Ors v. Tengku Mariam bte Tengku Sri Wa Raja & Anor* [1970] 1 MLJ 222) or the validity of an option in a lease declared by statute to be invalid for want of registration (see, *Taylor Fashions Ltd v. Liverpool Victoria Friendly Society* [1981] 1 All ER 897; [1981] 2 WLR 576). It has been applied to prevent a litigant from asserting that there was no valid and binding contract between him and his opponent (see, *Waltons Stores (Interstate) Ltd v. Maher* (1988) 164 CLR 387) and to create binding obligations where none previously existed (*Spiro v. Lintern* [1973] 3 All ER 319; [1973] 1 WLR 1002). It may operate to bind parties as to the meaning or legal effect of a document or a clause in a contract which they have settled upon (see the *Amalgamated* case) or which one party to the contract has represented or encouraged the other to believe as the true legal effect or meaning: *American Surety Co of New York v. Calgary Milling Co Ltd* (1919) 48 DLR 295; *De Tchihatchef v Salerni Coupling Ltd* [1932] 1 Ch 330; *Taylor Fashions.*

We would add that it is wrong to apply the maxim 'estoppel may be used as a shield but not a sword' as limiting the availability of the doctrine to defendants alone. Plaintiffs too may have recourse to it. The true nature of the doctrine in this context is that stated by Lord Russell of Killowen in *Dawsons Bank v. Nippon Menkwa Kabushiki Kaisha* LR 62 IA 100 at p 108:

> Estoppel is not a cause of action. It may (if established) assist a plaintiff in enforcing a cause of action by preventing a defendant from denying the existence of some fact essential to establish the cause of action, or (to put it in another way) by preventing a defendant from asserting the existence of some fact the existence of which would destroy the cause of action.
>
> It is also wrong to think that the doctrine is confined to cases where a representation of fact has been made or where a party has been encouraged by another to believe in the existence or in the non-existence of a fact. The decisions of the Privy Council in *Sarat Chunder Dey* and the *Calgary Milling Co* (among others) to which we have referred earlier concerned cases involving representations not of fact but of law.

The width of the doctrine has been summed up by Lord Denning in the *Amalgamated Investment* case ([1982] 1 QB 84 at p 122; [1981] 3 All ER 577 at p 584; [1981] 3 WLR 565 at p 575) as follows:

> The doctrine of estoppel is one of the most flexible and useful in the armory of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time, it has been sought to be limited by a series of maxims:
>
> estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. When the parties to a transaction proceed on the basis of an underlying assumption either of fact or of law – **whether due to misrepresentation or mistake makes no difference** – on which they have conducted the dealings between them – **neither of them will be allowed to go back on that assumption when it would be unfair or unjust to allow him to do so.** If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands. (emphasis added)

[89] As was explained by Lord Denning in *Amalgamated Investment & Property Co Ltd (in liquidation) v. Texas Commercial International Bank Ltd* [1981] 3 All ER 577 at p. 584:

> ... If parties to a contract, by their course of dealing, put a particular interpretation on the terms of it, on the faith of which each of them to the knowledge of the other acts and conducts their mutual affairs, they are bound by that interpretation just as if they had written it down as being a variation of the contract. *There is no need to inquire whether their particular interpretation is correct or not, or whether they were mistaken or not, or whether they had in mind the original terms or not.* Suffice it that they have, by the course of dealing, put their own interpretation on their contract, and cannot be allowed to go back on it. (emphasis added)

[90] Assuming for a moment that the plaintiffs were mistaken in thinking that the CCC had been issued, they nevertheless had conducted themselves in such a manner as to carry on with the CA with or without CCC, such that they are estopped on terminating the CA on ground of non-issuance of the CCC but merely to sue for the costs of remedying it and all losses that could be proved as arising out of the non-issuance.

[91] There was no damage that the plaintiffs could show with respect to this failure to obtain CCC *vis-a-vis* the students occupying the hostels. In fact, the plaintiffs' witnesses confirmed under cross-examination that there were no losses suffered which could be attributed to the non-issuance of the CCC. Granted the plaintiffs would not want to have a building without a CCC and indeed they had claimed for the costs of rectifying this and getting a CCC but that underscores the fact that all that they are entitled would be damages for breach and not a termination and repudiation of the whole contract in the CA.

[92] The very timing in the raising of the issue of the CCC only in 2013 after the plaintiffs had failed to fully take over the concession supports D1's contention that it is an afterthought. As we had stated earlier, it was an opportunity for the plaintiffs to capitalise on and to exploit it to the fullest in finding a way to buffer their loss in having to terminate the CA. The plaintiffs coyly avoided calling the witnesses from their end who would have knowledge of what transpired during the handing over of the hostels to P2 when completed.

[93] Fortuitously for D1 the CCC was obtained on the last day of the trial and hence this matter was no longer a live issue before the court.

[94] Be that as it may have, learned counsel for the plaintiffs asked the hypothetical question: what if the CCC had not been obtained. The answer is this, as claimed in the plaintiffs' prayers: they would be entitled to the extra costs they have to incur in getting the CCC. It may be for example that there

was a certain non-compliance with Bomba or the Fire and Rescue Department's requirements or that the building was not built as per the building plans and so some rectification works had to be done or that part of the building was unsafe and so have to be demolished.

[95] In fact, the evidence of D1 was that at all material time after the application for the CCC, it was trying to comply with the new and additional conditions imposed by the relevant authorities especially by the Fire and Rescue Department at the costs of millions of Ringgit even after this action had been filed.

[96] There was certainly no order to demolish the hostels erected. None of these now need to be done as the CCC was issued, albeit on the last day of trial on 20 February 2017 in Form F (exh. P45) as confirmed by the evidence of the DW3 (Supervising Architect) and DW4 (officer from MPKj).

[97] It was then raised that this evidence cannot be adduced without D1 amending its defence and that this evidence of the CCC is not consistent with the pleading of D1 which is that the non-issuance of the CCC was not its fault and that it had already submitted its application and was awaiting the CCC to be issued.

[98] We do not think so. There was no surprise at all for the plaintiffs had already taken the stand that no CCC had been issued and D1's defence was that it had applied for it and was waiting for the CCC to be issued by the local authority.

[99] It is axiomatic that the facts and answers pleaded were facts that were current at that time. D1 could only plead expectation of facts to occur in future. In this case, the plaintiffs' amended statement of claim ("ASOC") with respect to the CCC can be found at para. 155 of the ASOC which reads when translated as follows:

> After the buildings have been completed, D1, until presently has failed to secure the issuance of the CF or CCC.

[100] In reply thereto, D1 gave an answer at para. 96, as translated:

> ... and D1 has taken all necessary steps to comply with MPKj's directives and is certain that CF/CCC will be issued within a reasonable period of time.

[101] We agree with learned counsel for D1 that in essence D1's reply means that efforts have been made to secure the issuance of the CCC and that in turn mean, it was an ongoing process and therefore, will eventually be issued when all requirements of all the regulatory bodies would have been complied with. How was D1 going to plead about the CCC when at that time

it was not yet issued except by pleading that it will eventually be issued? So, the issue of CCC not being pleaded by D1 raised by the plaintiffs is totally misplaced and misconceived.

[102] Surely in such a case, as and when the CCC is issued D1 must be given the opportunity to lead evidence on it as not to do so would be to allow evidence to remain of that which is no longer true. In fact, it would be misleading the court if such a piece of vital evidence was not allowed to be admitted to correct what would then be an incorrect position.

[103] Here is a matter which is beyond the control of D1 as it is something that lies with MPKj. What needs to be pleaded is material fact and not evidence. The evidence of the CCC having being issued does not go beyond the pleading of D1 but rather is an extension of it.

[104] It is a concession made by D1 in correcting the pleading of the plaintiffs that no CCC had been obtained.

[105] Whilst what was pleaded by the plaintiffs and D1 were true at the time of the plaintiffs filing their statement of claim and ASOC and D1 its defence, the court must of necessity allow for a natural progression of things to be brought to the court's notice and more so when the plaintiffs are claiming for the costs incurred in rectifying the breach in D1 failing to obtain the CCC.

[106] We do not dispute the time-honoured principle on parties not being allowed to depart from their pleadings but what was adduced in the trial court does not deviate from this sacrosanct rule.

[107] The fact that O. 18 r. 9 of the Rules of Court 2012 allows parties to plead matters that take place after the issuance of the writ would by necessary implication, allow for a matter that was the live issue of the trial to be adduced if there had been any change since the parties gave evidence. It reads:

> **"9. Matter may be pleaded whenever arising (O. 18 r. 9)**
>
> Subject to rules 7(1), 10 and 15(2), a party may in any pleading **plead any matter which has arisen** at any time, whether before or **since the issue of the writ**. (emphasis added)

[108] If learned counsel for the plaintiffs wanted to be picky and pedantic about it, the learned JC should have allowed an oral application to amend the defence and counterclaim filed if indeed that was truly necessary, which we do not think so. The learned JC appeared quite fastidious in stating that since no formal application to amend the defence and counterclaim was made, she would disallow the evidence of the issuance of the CCC to be admitted. It was already the last day for trial and to have a formal application filed would be to delay the proceedings so late in the day.

[109] The case of *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944 was relied on by the learned JC in rejecting the evidence as being inconsistent with the pleaded defence. However, that case must be distinguished from the facts of this case as in *Samuel Naik* case (*supra*) the facts which were not pleaded were in existence from the date the case was filed.

[110] Moreover the issue here in the issuance of the CCC was the issue that sustained the life of the suit. Once it is admitted and accepted as evidence, there is no more live issue for the court to pronounce further save for antecedent breaches and the proof of damages.

[111] As was observed in *Ho Min Choo & Anor v. Jutamo Sdn Bhd* [2017] 4 CLJ 651; [2016] MLRHU 1294:

> [23] When the plaintiffs decided to file a civil suit against the defendant it was on the 29 October 2015 (approximately 9 years from the date of the delivery of vacant possession was to have taken place, ie May 2006), no explanation of any kind has been offered in this regard by the plaintiffs. **By the time this case was heard before the High Court on the 5th and 6th September, 2016, the PSP (SP1), the Supervising Architect at the time had already issued the required CCC dated the 28 December 2015** based on the second approved building plan by the local authorities in 2015 which had to be submitted for approval before resumption of construction works in rehabilitating and reviving the abandoned project could recommence by the said white knight.
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> ...
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> [37] I agree with the learned counsel for the defendant that in the circumstances of the case, the "living issue" principle applies. There arises no necessity for the declarations sought when those matters are already not in dispute. **There are no issues for determination since those issues had been superseded by the issuance and delivery of the CCC and CF respectively to the plaintiffs,** as well as the attempted delivery of vacant possession by the defendant which would have happened but for the plaintiffs unreasonable refusal to accept the keys to the said house in which case in the circumstances the defendant could not be faulted.
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> (emphasis added)

[112] We would say that the plaintiffs had no basis to object to the evidence of the CCC being adduced as that was after all the whole ultimate basis of their suit.

[113] There is in any event no damage or loss suffered by the plaintiffs. The clear evidence was that the students did move into and occupy the hostels upon completion.

[114] The CPC for phase one and phase two of the project had been secured on 2 May 2008 and 10 November 2009 respectively. The students had moved into the hostels in 2008.

[115] The above two breaches are not fundamental breaches that would entitle the plaintiffs to terminate the CA.

Whether The Termination Of The CA By The Plaintiffs Was Lawful In The Circumstances Of The Case

[116] It is not every breach that would entitle the non-defaulting party to terminate the contract and more so when the non-defaulting party had acquiesced in the breach and reap a benefit as a result of its own participation in the breach.

[117] Section 40 of the Contracts Act 1950 provides as follows:

> Effect of refusal of party to perform promise wholly
>
> 40. When a party to a contract has refused to perform, or disabled himself from performing, **his promise in its entirety,** the promisee may put an end to the contract, **unless he has signified, by words or conduct, his acquiescence in its continuance.** (emphasis added)

[118] The other relevant provisions of the Contracts Act 1950 are s. 56(1) and s. 56(2) as follows:

> **Effect of failure to perform at fixed time, in contract in which time is essential**
>
> 56. (1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.
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> **Effect of failure when time is not essential**
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> (2) if it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do the thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by the failure.

[119] The core of the CA consists of the "build-operate-transfer" concept of the project. The project had been built and D1 had started to operate it until it was persuaded to hand back to the plaintiffs on terms; which terms the parties could not agree. The plaintiffs had wanted to take over the operation of the hostel for they calculated that it would costs them less in the long run.

However, negotiations dragged on from 2012 to 2014 with debilitating effect on D1 and its ability to service its loan for there was hardly any payment of the rental in the meanwhile.

[120] This is not a case where D1 had not performed in its entirety the CA for it had completed and had begun to operate the hostels. Granted there were some breaches with respect to the failure to obtain the approval of the building plans before commencement of construction of the project but all these had been in the past.

[121] The Federal Court case of *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269; [2010] 1 MLJ 597 is instructive. The respondent had purchased a commercial shop lot in Berjaya Times Square from the appellant under a sale and purchase agreement. There was a cl. 22 which provided for LAD in the event of late delivery. There was also a cl. 32 that made time an essence of the agreement. The appellant failed in delivering possession by the stipulated date of 23 November 1998. Negotiations were held and as the appellant made further progress in the construction the respondent made further progress payments. The respondent did not elect to terminate and rescind the agreement immediately after 23 November 1998.

[122] When the appellant fails to deliver possession of the lot by end of 2002 as assured the respondent sued to claim back all sums paid under the agreement and damages and a declaration that the agreement had been rescinded. The appellant claimed that it was liable to pay only the LAD calculated according to the agreed formula.

[123] The High Court found that the appellant's failure to deliver vacant possession of the lot on 23 November 1998 constituted a fundamental breach of the agreement and that as time was the essence of the contract the respondent was entitled to rescind the contract under s. 56 of the Contracts Act 1950 and that the respondent was not confined to its remedy under the LAD clause in the agreement.

[124] The appellant appealed to the Court of Appeal but failed and it obtained leave to appeal to the Federal Court. The Federal Court held that for the breach of failure to deliver vacant possession the agreement provided a remedy that is the payment of LAD calculated on the agreed formula. It further held that this was not a case where there had been a total failure of consideration.

[125] The Federal Court also held that s. 56(1) and s. 40 of the Contracts Act 1950 ought to be read together. It held as follows:

A [4] ... A reference to ss. 40 and 56(1) of the Act clearly showed that the right to rescind a contract by way of termination only arises when there has been a total failure of consideration. What is of significance on the facts of this case is that there is no question of the appellant not having done anything on the construction of the property as undertaken by them *vide* the SPA. Indeed, the facts before the court showed that *the construction*
B *of the property was completed and was in the state of delivery to the respondent. It is my view that the entitlement of the respondent in this case is confined and limited to compensation in the form of LAD as agreed upon in the SPA and that the respondent has no right to rescind the SPA.* (emphasis added)

[126] The Federal Court in explaining the scope of s. 40 of the Contracts Act
C 1950 has this to say:

[24] It is my considered judgment that the position is no different in Malaysia. Section 40 of the Act is a restatement of the English common law position. It provides as follows:

D When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Special attention should be paid to the phrase 'his promise in its entirety'. Under the section the right in a non-defaulter to repudiate a contract only accrues when the
E *defaulter has refused to perform or has disabled himself or herself from performing the whole of his promise. If there is part performance by the defaulting party, the innocent party may not put an end to the contract.* (emphasis added)

[127] Granted too there had been a delay in getting the CCC but this did not prevent the operation of the project and indeed the students were occupying
F the hostels, oblivious to the non-issuance of the CCC.

[128] We had held for the reasons given above that in all probabilities the plaintiffs were aware of the breaches in terms of proceeding without prior approval of the building plans and the failure to obtain CCC upon getting the CPC.

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[129] However, the plaintiffs were influenced by other far more important considerations, though they would have been fully appraised of the above breaches, they nevertheless were keen to accommodate the students in the hostels completed. P2 was paying the rental to D1 until the negotiations to take over the operations of the hostels and when the terms for the takeover
H could not be agreed, the plaintiffs had then decided to capitalise on the so-called breaches to terminate the CA.

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[130] The breaches are not of the type that would justify a termination and repudiation of the CA that had been substantially completed and performed with no hiccups by D1.

[131] The learned JC had referred to the Court of Appeal case of *Ching Yik Development Sdn Bhd v. Setapak Heights Development Sdn Bhd* [1997] 1 CLJ 287 as authority for stating that the commencement of the construction without the approval of the building plans and the failure to obtain a CCC after the CPC is a breach of a fundamental term justifying the plaintiffs to terminate the CA.

[132] All that the Court of Appeal said is to lay down some guidelines to determine whether a term in a contract is a fundamental term or a subsidiary term and the breach of which yields different remedies and consequences as can be seen at pp. 295 to 296 as follows:

> Whether a particular term is fundamental to the contract or merely a term of subsidiary importance depends very much on the way in which the particular contract is constructed. Nevertheless, we think it quite safe to state the principle in this way. Absent any special considerations in a contract for the sale of land, the obligation to pay the purchase price is a fundamental term. So too is a term that the vendor has good title to the property that is the subject matter of the sale. If the parties desire to make some other obligation fundamental in nature, they must make it dependent upon one or other of these terms.
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> In support of the suggested approach we find it necessary to quote from two cases. The first is *Bettini v. Gye* [1876] 1 QBD 183 where, at p. 188, Blackburn J, when applying the test formulated by Parke B in *Graves v. Legg* [1854] 9 Ex. 709, at p. 716, said:
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> > [I]n the absence of such an express declaration, (that is, an express declaration in the contract of an intention to make the performance of a particular term a condition precedent or not a condition precedent) **we think that we are to look to the whole contract,** and applying the rule stated by Parke B, to be acknowledged, **see whether the particular stipulation goes to the root of the matter,** so that a failure to perform it would render the performance of the rest of the contract by the plaintiff a thing different in substance from what the defendant has stipulated for; or whether it merely partially affects it and may be compensated for in damages. Accordingly, as it is one or the other, we think it must be taken to be or not to be intended to be a condition precedent. (emphasis added)

[133] Another approach taken by the Court of Appeal in the above case is found at p. 296 as follows:

> Another approach to the problem in cases that involve synallagmatic contracts is to look at *the consequences of the breach of the term in question. If the breach is of such a nature that it goes to the root of the contract, then the term broken is fundamental in nature. On the other hand, if the consequences of the breach complained of are not serious in the sense that they do not go to the root of the contract, then the term in question is a subsidiary one entitling the innocent party to recover damages but not to treat the contract as being at an end.* Although this test is usually ascribed by textbook writers to the decision of the English Court of Appeal in *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha* [1962] 2 QB 26, it has a much older origin. (emphasis added)

[134] One way of determining whether the breach goes to the root of the contract is to look into the consequences of the breach. Here the plaintiffs were comfortable with allowing their students to occupy the hostels in spite of their higher moral ground if not a legal one that by doing so they were participating in an illegal act.

[135] One may also look at the question as to whether the obtaining of the CCC was such that time was of the essence to the CA. No doubt cl. 13.3 of the CA placed on D1 squarely the responsibility to apply and comply with all relevant requirements imposed by the relevant authority so that the certificate of fitness ("CF"), as it was then referred to, can be obtained. Reading the CA as a whole one cannot find a clause making time the essence of the obligation to obtain a CCC or a CF. However, there is cl. 1.1 of the CA reads:

> **Operational Concession Period** means the period commencing from the Date of Operation and ending on the last date of the Concession Period.
>
> **Date of Operation** means the date on which the Concessionaire makes available to KUIS the Accommodation and Student Centre for operation which shall be the date on which Certificate of Fitness is obtained or **on 1st September 2007 whichever is later for Phase 1**, and the date on which Certificate of Fitness is obtained or **on 1st September 2008 whichever is later for Phase 2.** (emphasis added)

[136] One would have thought that before the plaintiffs agreed to the date of operation, they would have asked for the CCC for it was clearly stated the date on which the CF is obtained, whichever be the later date. Whatever it is even if the CCC had been obtained earlier the date of operation of the concession cannot begin earlier than the designated dates.

[137] Again, if it is the later date that is applicable because of late issuance of the CCC, that would not change the concession period a jot because it would still expire at the end of 33 years from the date of the CA of 7 March 2006.

[138] As it is the later date and event and not the earlier date or event that is determinative, time then cannot be said to be of the essence to the CA. We agree that it does not mean that time can never be made the essence again by way of a fresh notice to obtain the CCC but not in this case where even before the obtaining of the CCC, the plaintiffs had allowed the date of operation to begin with their students moving in to occupy the hostels and had begun to make payments of the rental to D1 under the CA.

[139] Even when there is a clause to make time to be of the essence, the court must still construe the contract as a whole to see if there are other remedies available to see if there is a right to terminate the contract as a whole.

[140] We can do no better than to refer to the clear exposition on the law by the Federal Court in *Berjaya Times Square* case (*supra*) as follows:

> [44] Returning to the mainstream, we have here an agreement which contains two clauses. One that provides for the payment of a sum as liquidated damages calculated on a daily basis for the period of delay in making delivery of the premises in question and another that makes time of the essence of the contract. Applying the guidelines discussed earlier, it is my judgment that time is not of the essence of the agreement in this case. A promise to construct and deliver a building within a stipulated time coupled with a promise to compensate for any delay in delivery is inconsistent with a right to terminate on the ground that time is of the essence. It certainly points to an intention that time was not to be of the essence.
>
> [45] There is alternative ground for holding that time is not of the essence. It is this. *The respondent, though it had the right to put an end to the contract when the appellant failed to deliver the unit within the stipulated time, did not do so. Instead, it continued making payments and negotiating for delivery. The respondent's conduct certainly points to the conclusion that even if time was of the essence when the contract was made (speaking advisedly) it ceased to be of the essence.* There are many authorities on the subject. But I find it sufficient to merely refer to the judgment of Raja Azlan Shah J (as His Royal Highness then was) in *Wong Kup Sing v. Jeram Rubber Estates Ltd* [1969] 1 MLJ 245 where he said:
>
> > Once the time for completion was allowed to pass and the parties went on negotiating, then time was no longer of the essence of the contract and the defendants must give a reasonable notice of their intention to abandon the contract if the balance of the purchase money was not paid (*Webb v. Hughes* (1870) LR 10 Eq 281 at p 286; *Stickney v. Keeble & Anor* [1915] AC 386 at p 423). If the defendants had on the very day of 30 November 1966 ie the original date for completion, made their stand, their decision would have been that time was of the essence and it would have

A been proper for them to give notice on the day fixed for completion that they would abandon the contract; but after going on negotiating they should have given a reasonable notice (*Tilley v. Thomas* (1867) LR 3 Ch APP 61).

However, I am content to decide this appeal on the former ground, that is to say, that when the agreement in this case is properly construed in accordance with the relevant guidelines, time was not of the essence *ab initio.*

[46] To summarise, this is a case in which, *upon a proper construction of the agreement, time was not of the essence. The respondent was not therefore entitled to terminate or put an end to the contract when the appellant failed to deliver the unit of shop lot on the stipulated date. All that it was entitled to receive was compensation* calculated on the agreed basis. Its purported termination of the agreement was therefore wrongful. (emphasis added)

[141] Learned counsel for the plaintiffs cited the case of the Federal Court in *Damansara Realty Bhd v. Bungsar Hill Holdings Bhd & Anor* [2011] 9 CLJ 257 that stating the proposition that there is no necessity in law that a clause making time of the essence must be expressed in any given contract. Whilst that is true it is more a case of stating an exception that underscores the general rule that time should be expressly stated to be of the essence before a party can rely on it to terminate a contract.

[142] Even if time is of the essence where obtaining the CCC is concerned whether from the start or after the formal notice is given, we find that there had been acquiescence on the part of the plaintiffs in allowing and approving of D1 to do all that is necessary or as may be required by the Fire and Rescue Department for the issuance of the CCC.

[143] Surely when D1 was carrying out remedial works in the buildings the plaintiffs would surely have asked why these were necessary and if as they said that the CCC was very important to them, they would have acted consistent with that belief by asking for the CCC from D1 before letting their students to occupy the hostels.

[144] Furthermore, the act of negotiating to take back the operations of the hostels from D1 is clear indication that the parties had continued with the CA and not a case where the plaintiffs had elected to terminate the CA on account of failure to obtain the CCC. The plaintiffs' contention sounded rather hollow when P2's students were continuing to occupy the hostels and there was no occasion when they had to move out or be relocated elsewhere.

[145] Support for this proposition is found in the Federal Court case of *Sim Chio Huat v. Wong Ted Fui* [1983] 1 CLJ 178; [1983] CLJ (Rep) 363; [1983] 1 MLJ 151 as follows at p. 366 (CLJ); p. 153 (MLJ):

> In modern law of contract *prima facie* a stipulation as to time is not of the essence of a contract, unless the parties agree that it be so. (See Lord Simon of Glaisdale in *United Scientific v. Burnley Council* [1978] AC 904 at 940 and 944. In this case as time was provided to be of the essence of the agreement, the stipulated periods within which these four houses had to be delivered to the respondent became an essential condition of the agreement. Failure by the appellant to fulfill this condition would entitle the respondent to have an option of treating the agreement either (a) as having been repudiated and dismissing the appellant; or (b) as still continuing. (See *9 Halsbury's Laws of England*, 4th edn. para 538, page 370).
>
> In this case obviously *he did not choose to treat the agreement as having been repudiated. By allowing the delivery dates to pass and by acquiescing in the work continuing under the agreement* and indeed by ordering extra work to be done for each of these houses, for which the agreement made no provision, *the appellant must be held to have waived his right to rescind the agreement on account of repudiation and also the right to treat himself as discharged therefrom. He must be deemed to have elected the agreement as still continuing.* (emphasis added)

[146] There was also the argument that the CA had to be terminated for a continuing illegality on the part of D1 that the plaintiffs do not want to be a part of. This court had held that the plaintiffs were in all probabilities part and parcel of the same purposeful and practical approach to accommodate the students and it is too late in the day to now raise illegality.

[147] The approach taken by our courts as contained in the *dicta* of Edgar Joseph Jr FCJ in the Federal Court of *The Co-operative Central Bank Ltd (In Receivership) v. Feyen Development Sdn Bhd* [1995] 4 CLJ 300; [1995] 3 MLJ 313 at p. 307 (CLJ); p. 321 (MLJ) as follows is instructive:

> *Nevertheless, the general rule is that a contract, the making of which is prohibited by statute expressly or by implication, and which stipulates for penalties for those entering into it, shall be void and unenforceable, unless the statute itself saves the contract or there are contrary intentions which can reasonably be read from the language of the statute itself.* (See *Holman v. Johnson* [1775] 98 ER 1120 at p 1121; *Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356). However, the general rule is subject to exceptions and, at the end of the day, it is question of construction of the particular statute. This point was aptly put by Gibbs CJ in *Yango Pastoral Co Pty Ltd v. First Chicago Australia Ltd* [1978] 139 CLR 410 thus wise:
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> > It is often said that a contract expressly or impliedly prohibited by statute is void and unenforceable. That statement is true as a general rule, but for complete accuracy it needs qualification, because it is possible for a statute in terms to prohibit a contract and yet to provide, expressly or impliedly, that the contract will be

A valid and enforceable … *Where a statue imposes a penalty upon the making or performance of a contract, it is a question of construction whether the statue intends to prohibit the contract in this sense, that is, to render it void and unenforceable, or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed.*

(emphasis added)

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[148] See also the flexible "range of factors" approach taken by the UK Supreme Court in *Patel v. Mirza* [2017] 1 All ER 191 such as the policy reason behind the prohibition, the proportionality principle and bearing in mind that enforcement is not the concern of the civil courts but the enforcement authority. We would hold that the plaintiffs were not entitled to terminate
C the CA and that their termination of the CA is unlawful in the circumstances.

What Are The Counterclaims Of D1 That Should Be Allowed And The Basis For Assessment Of Damages?

[149] Under the CA, Rehda (D1) was required to build the hostels with its
D own funding and to be allowed to operate it for 33 years so as to recoup the costs of construction with of course some profits to be made. For this project, D1 secured financing of RM125.8m from Bank Muamalat (D2) and its consortium of banks and to whom D1 had assigned its rights, benefits and interests in the CA to the D2.

E **[150]** Whilst D1 is not asking for specific performance of the CA, it nevertheless is prepared to accept the termination of the CA but that assessment of damages has to be based on the fact that the termination by the plaintiffs had been unlawful.

F **[151]** The plaintiffs admitted that they have to pay for the construction of the hostels and the learned JC then had ordered the plaintiffs to pay D1 the market value of the hostel less all sums of moneys which the plaintiffs had previously paid D1. We affirm this order of the learned JC consistent as it is with the doctrine of unjust enrichment. The market value is of course confined to the buildings without taking into account the land because the
G land belongs to P1.

[152] The Federal Court in the case of *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453 applied the doctrine of unjust enrichment as follows:

H [123] The plaintiff has unquestionably benefited even though it did not request for the mall to be constructed. *But the mall was not constructed and maintained by the defendant to benefit the plaintiff gratuitously. The plaintiff does not seek the aid of the court to pull down the mall. The plaintiff undoubtedly is now in a position to have the benefit of a completely constructed mall.* The construction

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of the mall is indeed an objective enrichment to the plaintiff. The plaintiff would receive a massively enhanced asset and this adds to its enrichment. The mall is an indisputable benefit to the plaintiff ...

[124] The defendant did not only construct a building, or merely constructed a property on land. The defendant had built and continues to build an entire enterprise, brand name, goodwill encompassing all that is known as the mall. But more than that, the defendant's *bona fide* improvement and enhancement of the land, namely by obtaining permission, building plan approval and constructing the mall were all done entirely through the sole act and effort and at the sole costs of the defendant. By reason of the defendant constructing the mall at its own costs on the land, it had substantially enhanced in value.

...

[126] The defendant had embarked upon the promotion of the mall and was responsible for the overall running, upkeep and maintenance of the building, road and infrastructure as well as the general administration of the mall. The defendant had expended time, effort, expertise and all at its own costs in establishing and maintaining the business venture known as the mall to the stature and success it had reached to date. This involved extensive and continuous marketing and promotional strategies since the inception of the mall.

[127] In our judgment, the enrichment or benefit of the plaintiff was undoubtedly at the expense of the defendant.

....

[130] On the factual matrix of the present case, in our judgment, injustice has occurred to such an extent that the defendant has not only suffered a loss, but the plaintiff is at the same time made richer by the defendant's loss by the same amount. On that note, the point to make here is this. *This sense of injustice at the defendant's expense is central to the foundation of the relief of restitution based on the law of unjust enrichment. The plaintiff should not be allowed to reap the windfall at the expense of the defendant.* The defendant lawfully constructed the mall on the land not intending to do so gratuitously with the plaintiff enjoying its benefit. On this basis, it warrants judicial intervention as a legal response triggered by an unjust enrichment in the fact situation of the present case.

[131] To conclude, we hold that the defendant had made out a cause of action in unjust enrichment in that the plaintiff has been enriched, that this enrichment was gained at the defendant's expense, and that the plaintiff's enrichment was unjust. (emphasis added)

[153] The assessment of the market value of the property is to be done by the same learned JC (now judge) who had heard the matter, based on the expert evidence by valuers that the parties may call. The assessment of the market value of the hostel is as at the date of the High Court judgment.

[154] Learned counsel for the plaintiffs submitted that the plaintiffs need only to pay for the construction costs of the building as provided for in the CA. However, that is only applicable and relevant if it is a case of lawful termination by the plaintiffs under cl. 19.1.4(ii) which reads:

> KUIS shall, within thirty (30) days of the Defaulting Party Termination Date, pay to the Concessionaire the value of the **Construction Works**, as certified by the Project Architect, **less the aggregate amount collected by the Concessionaire under clause 4.6** (emphasis added)

[155] Clause 4.6 is the collection of rental by P2 from its students and making the payments over to D1.

[156] As it is a case of unlawful termination as we have so held, to assess the damages based on the construction costs of the hostel buildings and the student centre would be to confer a benefit to the plaintiffs at the expense of D1 and that would be another form of unjust enrichment of the plaintiffs. The plaintiffs can tomorrow dispose of the buildings and land with a profit to themselves or to enter into a lease of the building to a third party and make their profits with D1 being left high and dry except for recouping its construction costs.

[157] A fair basis of assessment would be to assess the properties at market value and to allow the deduction from that market value assessed the payments that the plaintiffs had made and will be making to D1 arising from the arrears of rental not paid. It is staying as close as possible to the formula that the parties had provided for in the event of a breach by the concessionaire (D1).

[158] We are of the view that D1 is also entitled to the rentals that they were unlawfully deprived of from the second semester of session 2012/2013 to the second semester of session 2014/2015.

[159] What D1 further suffers as a result of the unlawful termination by the plaintiffs is that it was being unlawfully deprived of the profits that it could have made if the concession were to run its full course. That is claimable under s. 74 of the Contracts Act 1950 with respect to losses which naturally arise in the usual course of things from the breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it where the bank penalty and financial charges are concerned.

[160] As for the above assessment of damages for the remaining unexpired period of the concession from 2016 to 2039, that shall be D2's loss of profits compared to a case where the CA is allowed to run its course. The overall assessment of damages shall take into consideration all relevant and necessary costs that naturally arise in the building and operation of the project including the initial costs of constructing the building and furnishing it, the costs of maintaining the hostel and the financing costs.

[161] All sums as may be assessed by the judge shall be paid directly by the plaintiffs to the bank D2 and shall carry interest at rate of 5% per annum from date of judgment of the High Court to realisation.

[162] The other orders of the High Court were set aside and the claims of the plaintiffs dismissed and the other counterclaims of D1 were also dismissed.

[163] We ordered costs of RM10,000 to be paid by the plaintiffs who are P1 and P2 in this appeal to the D1 the appellant. We made no order as to costs with respect to D2 the bank who is P3 in this appeal.